IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
APPEAL FROM ORDER NO.623 OF 2005

Mr.Mir Attar Hussein Abdul Hussein Appellant

Vs.

B.M.C. Respondent

Mr.R.A.Thorat with Mr.Gajendra C. Singh for appellant.

Mrs.G.S.Joglekar for respondent.

CORAM: B.H.MARLAPALLE,J.

June 08, 2005.

P.C.:

1. Heard Mr.Thorat with Mr.Singh, the learned counsel for the appellant and Mrs.Joglekar, the learned counsel for the respondent-Municipal Corporation.

2. A plot of land bearing Survey No.41(Part) North Oshiwara area admeasuring about 62,566 Sq.Mtrs. was handed over to the Respondent-Corporation by MHADA for the purpose of play ground on or about 6th April 1987 and as per the Municipal Corporation at that time it was an open plot without any structures thereon. Suit No. 1923 of 2000 was filed by one Bapu Narayan Romane seeking the relief that the Corporation be restrained from demolishing the premises consisting of GI sheet walls and AC sheet roof admeasuring 80x50 ft. without due process of law standing on the said plot. Some interim order was passed in this suit and subsequently the plaintiff alleged to have proceeded to construct some structures which were demolished on 20-1-2002. The notice under Section 351 of the Mumbai Municipal Corporation Act, 1988 was issued on 23-1-2002 and

the same was challenged in Suit No.2912 of 2002. Again structures were demolished on 15-7-2003. The present appellant filed Suit bearing No.2315 of 2004 in the City Civil Court at Mumbai seeking the relief that the Corporation be restrained from demolishing premises admeasuring 20x30 ft. with B.M. Walls and A.C. Sheet roof situated at room no.16, 95¦1755 Durga Chawl Community, Anand Nagar without due process of law. An ad-interim order was passed by the Court below and thereafter the Corporation proceeded to issue notice under Section 314 of the M.M.C. Act on 20-5-2004. On issuance of this notice Suit No.2315 of 2004 was disposed of. The plaintiff submitted his reply to the notice on 24-5-2004 through his lawyer and the Asst. Commissioner passed an order dated 10th November 2004. The operative part of the said order reads as under:

> "After carefully going through the reply submitted by your client and on perusing the documents I have come to the conclusion that the notice structure is unauthorized and you are requested to instruct your client to remove the unauthorized structure within 8 weeks (as per the directives of the Hon'ble City Civil Court in B.C.C.C. Suit No.2315 of 2004) from the receipt of this order failing which the same will be removed at your clients' risk and cost."

3. Being aggrieved by this order dated 10112004 passed by the Asst.Commissioner, K-West Ward the appellant filed L.C.Suit No.193 of 2005 and Notice of Motion No.278 of 2005

was also taken out in the same for temporary injunction restraining the Corporation officials from demolishing the suit structure and after hearing the respective parties the Notice of Motion came to be rejected by the learned Judge of the City Civil Court, Greater Mumbai on 29-3-2005. The said order is challenged in this appeal.

4. Mr.Thorat, the learned counsel by reading the provisions of Section 314 of the M.M.C. Act submitted that the subject structure was not an encroachment on the public road / street and, therefore, the notice under Section 314 of the M.M.C. Act was illegally issued. The order dated 10-11-2004 originated from the said illegal notice and thus the trial Court ought to have considered the said legal issues along with the documentary proof placed on record in support of a prima facie case for interim injunction as prayed for. The learned counsel for the Municipal Corporation on the other hand submits that the notice was legally issued and the purported documents submitted by the plaintiff in support of the prima facie case have been, on proper considerations, discarded by the trial Court.

5. The notice dated 20-5-2004 issued by the Municipal Corporation clearly states that the subject structure is located on the Municipal Plot situated at 60, D.P. Road, Anand Nagar, Opposite Heera Panna Building, Oshiwara and the description of the said structure is given as unauthorised construction on municipal plot admeasuring 8.20 mtrs. x 6.70 mtrs. with brick masonry walls, A.C. sheet roof and rolling shutter door. Thus there is no dispute that the subject structure is not located on the

public street. The only point raised by Mr.Thorat that Section 314 was not attracted and the Corporation had some other remedy for the eviction of the plaintiff from its plot appears to be impressive at the first blush but as pointed out by the learned counsel for the Municipal Corporation there is no merit in the said submission. Section 314 is applicable to the structures on the public streets as well as public places and this has been well settled by the decision of the Apex Court in the case of Municipal Corporation of Greater Bombay v. Premnagar Zopadapatti Committee Society reported in **AIR 1991 SC 817**. The respondent-Corporation acquired the land in dispute in 1974 in that case for public purposes mainly for establishing a nursing college, medical college, primary school and garden etc. A number of members including the respondents encroached upon the said land and made unauthorised construction in the shape of huts. The Corporation issued notices under Section 314 of the M.M.C. Act for evicting the respondents. The encroachers had filed suit along with injunction application which was rejected. The encroachers approached this Court and the learned Single Judge by his order dated 15-6-1989 had granted interim injunction restraining the Corporation from evicting the respondents by resorting to notices under Section 314 of the Act. The Supreme Court held that the plot of land was a public place and, therefore, the view taken by this Court that no proceedings under Sections 313 and 314 of the Act could be taken against the respondents was erroneous. The Apex Court held that the land which had been acquired for the public purpose was a public place and any encroachment made on that land by any person could be

dealt with under Section 314 of the Act.

6. The above quoted operative part of the order passed by the Asst. Commissioner deals with the demolition of the structure and the reply filed by the Corporation before the trial Court indicates that in 1987 no structures were standing and thereafter on two occasions the structures were removed but they were re-erected. The documentary evidence submitted by the plaintiff in support of his prima facie case has been properly considered by the trial Court and these documents have been discarded and rightly so. Thus the prima facie view taken by the trial Court cannot be termed as erroneous so as to call for interference in this appeal. Hence the appeal must fail. The same is hereby dismissed in limine.

7. The oral application for continuing the status quo order is hereby rejected.

(B.H.MARLAPALLE,J.)